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IN THE

Supreme Court of the United States

October Term, 1966.

No. 956.

ROBERT B. BENNETT, Acting Warden, Louisiana State Penitentiary, *Petitioner,*

v.

EDGAR LABAT and CLIFTON ALTON PORET, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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No. 956.

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Petitioner,

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Respondents.

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OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Louisiana (R. 316-337)[1] is reported at 234 F. Supp. 171 (1964). The majority opinion of the court en banc of the Court of Appeals for the Fifth Circuit (Pet. 45-113),[2] and the concurring opinions and the one dissenting opinion, are reported at 365 F. 2d 698 (1966).

1. "R." refers to the mimeographed record prepared for the Court of Appeals and filed with this Court by petitioner.

2. "Pet." refers to the Petition for Writ of Certiorari filed on behalf of the State of Louisiana.

JURISDICTION.

The jurisdictional requisites are set forth adequately in the Petition, except for failure to state that Mr. Justice Brennan extended the time to file the petition until January 13, 1967, and that such petition was actually filed on January 10, 1967. On February 11, 1967, the Clerk granted respondents' request for an extension to and including March 11, 1967 to file this Brief for Respondent in Opposition. On March 9, 1967, Mr. Justice Black granted a further extension to and including March 25, 1967.

QUESTIONS PRESENTED.

Negro respondents, after a jury trial, were found guilty of rape of a white woman in Louisiana, and given the death penalty. By petition for a writ of habeas corpus filed in the federal court in Louisiana, respondents challenged the constitutionality of the conviction, claiming that the grand and petit juries were improperly made up since members of their race were excluded on racial grounds. These claims were rejected by the District Court and the Court of Appeals for the Fifth Circuit but this Court granted a writ of certiorari and remanded the case for disposition of the question "whether members of the petitioners' race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution". *United States ex rel. Poret v. Sigler,* 361 U. S. 375. The District Court after hearing found that there was no racial exclusion in jury selection but the Court of Appeals, en banc, reversed, holding that there was racial exclusion. In addition, two Judges concurred on the ground that there was exclusion of "daily wage earners" and that this independently violated the Federal Constitution. Therefore, the questions presented are:

1. Should this Court issue its writ of certiorari to consider the question whether the exclusion of "daily wage earners" as a class from jury service is constitutional since the judgment sought to be reversed rests on an independent ground, to wit, that the record supporting the prima facie case of racial exclusion was virtually identical to the record that was before this Court in *Eubanks v. Louisiana,* 356 U. S. 584, and that the "daily wage earner" exclusion, rather than being a benign explanation of such prima facie case, was actually the device by which the racial exclusion was brought about?

2. Assuming that the record does not support a finding of racial exclusion, have not previous decisions of this Court made it clear that the "daily wage earner" exclusion is an arbitrary and, therefore, an unconstitutional practice?

STATEMENT OF THE CASE.

On May 23, 1953, respondents, both Negroes, were convicted of the rape of a white woman and sentenced to death.[3] Respondents have been on death row since that time. Their cases have been before this Court on three different occasions, once on direct review of the State court judgment[4] and twice on petitions for writs of certiorari to review decisions of the Court of Appeals dealing with a petition for habeas corpus filed in the United States District Court for the Eastern District of Louisiana.[5] The present proceedings arise out of this Court's per curiam decision and order which remanded the case to the District Court (361 U. S. 375):

> . . . for disposition of the question whether members of petitioners' race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution.

After motions and discovery (R. 31-46), the racial jury exclusion issue came on for a hearing (R. 48). Testimony, depositions and stipulations established that, while

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3. If the sentences in this case should ever be reinstated, the institution of new habeas corpus proceedings will be called for which challenge the death sentence in light of recent decisions of this Court including: *Robinson v. California*, 370 U. S. 660; *Rudolph v. Alabama*, 375 U. S. 889, 891 (Justice Goldberg dissenting from denial of writ of certiorari); *Trop v. Dulles*, 356 U. S. 86.

4. *Michel v. Louisiana*, 350 U. S. 91, *reh. den.*, 350 U. S. 955 (Failure to challenge the grand jury on the basis of racial exclusion prior to expiration of third judicial day of the grand jury term constitutes a waiver under a State procedural requirement contained in LSA-R. S. 15:202) (Warren, Black and Douglas dissenting).

5. *Poret v. Sigler*, 335 U. S. 60, 879 (Certiorari to Supreme Court of Louisiana denied; certiorari to Fifth Circuit granted and case remanded to District Court, petitioners having exhausted state remedies); *United States ex rel. Poret v. Sigler*, 361 U. S. 375 (Certiorari to Fifth Circuit granted; case remanded).

the 1950 census indicated that approximately 32% of the population of Orleans Parish was non-white (R. 248, 249), the Parish Jury Commissioners had, since 1936, certified Negroes as qualified under the state law in petit jury venires in numbers approximating only 10% of the venire (R. 166-167, 279), and that, within the memory of all persons concerned with petit jury selection in the Parish prior to the date of trial, no Negro had ever served on a petit jury empannelled to try a Negro defendant (R. 276), and that, within the memory of such persons, only one Negro had ever been selected to serve on a petit jury empannelled to try any defendant (R. 276). This was the situation, despite the fact that, according to the 1950 census, there were 181,775 Negro residents (R. 277-278), that there were 51,126 Negro males between 20 and 64 years of age (R. 278),[6] that, of the Negro population, 84,412 were male and 97,363 females[7] (R. 278), that the median years of educa-

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6. LSA-R. S. 15:172:

> The qualifications to serve as a grand juror or a petit juror in any of the courts of this state shall be as follows:
>
> To be a citizen of this state, not less than twenty-one years of age, a bona fide resident of the parish in and for which the court is holden, for one year next proceeding such service, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, provided that there shall be no distinction made on account of race, color or previous condition of servitude; and provided further, that the district judge shall have discretion to decide upon the competency of jurors in particular cases where from physical infirmity or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of any particular case.
>
> In addition to the foregoing qualifications, jurors shall be persons of well known good character and standing in the community.

LSA-R. S. 15:174 exempts from jury service, *inter alia*, "[A]ll persons over sixty-five years of age. . . ."

7. LSA-R. S. 15:172-1: No woman shall be drawn for jury service unless she has previously filed with the clerk of the district court a written declaration of her desire to be subject to jury service.

tion completed by the Negro population was 6.5 (R. 278), that there were 43,720 Negroes age 25 or over with seven or more years of formal education (R. 278), that Negroes had served on United States District Court juries in the Eastern District of Louisiana for 50 years or more (R. 279) and that in 1952, there were 28,005 Negroes (15,934 males) registered to vote in the Parish (R. 279). The statistical facts clearly establish a prima facie case of racial exclusion in the selection of juries.

The District Court did not make separate; enumerated findings of fact. Rather, it filed an opinion which discussed only a portion of the evidence, made no reference to the stipulation of facts and concluded "there was absolutely no discrimination of any kind based upon race or color of the prospective jurors" (R. 329). Furthermore, it concluded it was " 'almost frivolous' to assert that there has been a bias in the Parish . . . against the inclusion of Negroes on the jury panels of that parish" (R. 336). It therefore denied respondents' application for a writ of habeas corpus (R. 337).

On appeal, the Court en banc of the Court of Appeals for the Fifth Circuit—seven Judges sitting—reversed in a majority opinion by Judge Wisdom, with only one Judge (Judge Gewin) dissenting, and remanded with directions to issue the writ releasing the petitioners from custody on their convictions and sentences, subject to reindictment and retrial by the State. In a separate opinion, Judges Bell and Coleman concurred, basing their result on what they regarded as economic, rather than racial, exclusion from jury service.

The Petition to this Court followed. Respondents remain, as they have for 14 years, in solitary confinement on death row.

ARGUMENT.

I. This Case Involves Only the Well-Settled Issue of the Unconstitutionality of a State Criminal Indictment and Conviction by Grand and Petit Juries Selected on a Basis Affected by Racial Exclusion, and Not Petitioner's Claimed Issue of Whether Exclusion of "Daily Wage Earners" Per Se Is Unconstitutional.

Petitioner's entire petition is premised upon a misapprehension of the issue actually decided by the majority opinion of the Court of Appeals. Ever since the remand by this Court in 1960, this case has involved the issue of whether Negroes had been intentionally and systematically excluded from juries in Orleans Parish at the time of respondents' indictment and trial.

The court which heard and decided the case after its remand treated it as involving only racial exclusion. Limitation of the scope of evidence to that issue was announced frequently by the District Court (R. 37, 46, 48, 90, 151). That issue was the sole basis of the District Court's opinion (R. 321, 326, 334, 336-337). On appeal, racial exclusion was the basis of Judge Wisdom's majority opinion in the Court of Appeals (Pet. 48, 70 at fn. 23, 79-80, 89-90, 101-106, and 108-109).[8]

The prima facie case of racial exclusion in the selection of the jury proven in the record is virtually identical to the record in *Eubanks v. Louisiana*, 356 U. S. 584,[9] a case

8. Judge Gewin in dissent stated ". . . the question we are to determine is whether there has been a Federal Constitutional infringement with respect to *deliberate* and *intentional* limitation and exclusion of petitioners' *race*. . . ." (Pet. 116). (Emphasis by court). The concurring opinion of Judge Bell stated: "My concurrence, *unlike the majority opinion*, is not based on race." (Pet. 140). (Emphasis supplied).

9. Nowhere in its Petition does the State of Louisiana discuss or even cite *Eubanks*.

involving the same jury selection process in the same Parish for the same years. Speaking for a unanimous Court, Mr. Justice Black said, 356 U. S. at 586-587:

> Although Negroes comprise about one-third of the population of the parish, the uncontradicted testimony of various witnesses established that only one Negro had been picked for grand jury duty within memory. And this lone exception apparently resulted from the mistaken impression that the juror was white. From 1936, when the Commission first began to include Negroes in the pool of potential jurors, until 1954, when petitioner was indicted, 36 grand juries were selected in the parish. Six or more Negroes were included in each list submitted to the local judges. Yet out of the 432 jurors selected, only the single Negro was chosen. Undisputed testimony also proved that a substantial number of the large Negro population in the parish were educated, registered to vote and possessed the qualifications required for jury service, all of which is emphasized by the fact that since 1936 the Commission has regularly selected Negroes for the grand jury panel. Indeed, Negroes have served on the federal grand jury in the parish for many years.
>
> * * *
>
> It seems clear to us that Negroes have been consistently barred from jury service because of their race. (356 U. S. at 587-588)

Moreover, *Eubanks* itself was merely a reiteration of a long series of decisions by this Court proscribing racial exclusion from juries, extending from *Neal v. Delaware*, 103 U. S. 370 through *Whitus et al. v. Georgia*, 35 U. S. L. WEEK 4176 (U. S. Jan. 24, 1967), decided just this term.

The "daily wage earner" rationale was raised not by respondents, but by petitioner as an attempted explanation of respondents' prima facie racial exclusion case based upon statistics and prior history and practice in Orleans Parish. For the first time, when arguing before the District

Court, the State tried to show that the exclusion of Negroes, so clearly proven in the prima facie case, was explicable on grounds not tainted with race.

The majority of the Court of Appeals, however, rejected the explanation and held that, just as a general denial of discriminatory practices does not overcome a prima facie case based on statistics,[10] the "daily wage earner" explanation did not overcome the fact that the state's method of selecting the jury actually resulted in exclusion based upon race. In fact, as the Court found (Pet. 101-106), the exclusion of "daily wage earners" was the device by which racial exclusion was accomplished. From an examination of the 1950 census records (R. 247-270), the Court of Appeals found that 22 percent of all Negro males over 14 years of age were laborers and were thus excluded, while only 3.8 percent of the white males over 14 were in this category (Pet. 101). Furthermore, as the District Court also found, of the Negro work force, 37 percent were laborers and approximately 10 percent were other types of "outside" workers (R. 335). Thus, through the exclusion of "daily wage earners", a full 47 percent of the Negro work force had been excluded from jury service. The full exclusionary impact of this practice can only be appreciated when it is remembered that Orleans Parish jurors are drawn exclusively from those in the "working ages" (21 to 65), and that women are exempted unless they volunteer. When closely scrutinized, the "benign and theoretically neutral principle" (Pet. 101) was revealed as an insidious vehicle to achieve racial exclusion, which "operated to exclude all but a token number of Negroes from the venires" (Pet. 101). The jury officials were under "a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.'" *Avery v. Georgia*, 345 U. S. 559, 561. In fact, they adopted a procedure certain to produce the exact opposite result.

10. *Eubanks v. Louisiana*, 356 U. S. at 587.

Thus, the petition presents no new or novel federal constitutional question, but merely an application of the long, unbroken line of this Court's decisions that state criminal indictments and convictions cannot stand where they are accomplished by juries selected on a basis which results in racial exclusion. Thus, it is not necessary to reach petitioner's issue of whether, race not involved, a jury selected in a manner which excludes "daily wage earners" is constitutionally permissible under the Fourteenth Amendment.

II. Even if This Court Had to Reach the Issue of Daily Wage Earner Exclusion, Assuming No Proof of Racial Discrimination, the Result Reached by the Court Below Was in Accord With Previous Decisions of This Court, Since Economic Exclusion of the Sort Consistently Applied in Orleans Parish Violates Both Due Process and Equal Protection of The Laws.

Preliminarily, it must be pointed out that the record refutes petitioner's contention that there was no "blanket exclusion" of daily wage earners but only a "liberal granting of excuses by the request of the prospective jurors" (Pet. 19), and that those excused from jury duty were "those who wanted to be excused . . ." (Pet. 20). The jury selection process in Orleans Parish began when the Jury Commissioners selected names from the City Directory (which listed occupations) for inclusion in a "pool" of potential jurors (R. 79-80). From time to time, names were drawn from this pool and placed in the "General Venire" or "Jury Wheel" (R. 116). From the "Jury Wheel", the grand jury venire was selected and the proposed petit jury venires were drawn (Pet. 74).[11] At the

11. Petitioner argues that the court below has "reversed" *Michel v. Louisiana, supra,* note 4, and gone beyond the mandate in *United States ex rel. Poret v. Sigler, supra,* note 5, which mandate involved only petit juries. *Michel,* however, was before this Court on direct review of the judgment of the Louisiana Supreme Court. Thus, any

very inception of the jury selection process, when names were selected for inclusion in the "pool" from which the "Jury Wheel" was filled, the Jury Commissioners "evolved a sort of reasoning" (R. 81) whereby they selected only those who "looked like they were either inside workers, salaried workers, or in some kind of sales work or in executive types, something like that, where they would not be subject to lose money" (R. 81). If a name was placed in the pool in the mistaken belief that an individual was an "inside worker" and it developed that he was "hourly rated", his name would be removed from the "pool" (R. 90-91). The ranks of the few daily wage earners who survived this screening were reduced further by what the Court of Appeals found was a policy of excluding outside workers by the judges (Pet. 102) and by what even the petitioner admits was a policy of "liberal" excuses (Pet. 19).

Ever since *Hernandez v. Texas*, 347 U. S. 475 (Mexican-Americans) and *Hoyt v. Florida*, 368 U. S. 57 (women), it has been constitutionally impermissible for a State to exclude arbitrarily any class of its citizens from jury service. The petitioner does not quarrel with the precept, articulated in *Hoyt*, that ". . . the right to an impartially selected jury assured by the Fourteenth Amendment . . ."

> . . . requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusion (368 U. S. at 59).

"law of the case" that might arise from the holding in *Michel* that noncompliance with a State time requirement worked a "waiver" of a federal constitutional right would not have a binding effect in a later challenge by habeas corpus proceedings. *Fay v. Noia*, 372 U. S. 391. The merits of respondents' contention that Negroes were systematically excluded from grand jury service were not passed upon by this Court in *Michel*. It was only after the present record was made that the practice of racial exclusion from both grand and petit juries became clear. Since both types of jury were drawn from the same challenged "General Venire" (Pet. 74), the decision of the Court of Appeals is the only correct result.

The issue, to the extent any remains,[12] is whether the majority (and the two concurring judges) of the Court of Appeals was correct in relying upon *Thiel v. Southern Pacific Co.*, 328 U. S. 217, a civil action based upon this Court's supervisory power over federal courts,[13] to support the proposition that an exclusion of daily wage earners, which bears no relationship to their capacity for jury service, is an arbitrary exclusion. When the language and reasoning of *Thiel* is considered in light of *Hoyt* and *Hernandez*, it becomes clear that the same basic principles are involved. As this Court stated in *Thiel*, 328 U. S. 220:

> Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

The Court also went on to say, 328 U. S. at 223:

> Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. *In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror.* (Emphasis supplied.)

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12. It borders on the frivolous to argue, as petitioner attempts to, that respondents have not demonstrated that daily wage earners are a "distinct class" in the community. This Court in *Thiel v. Southern Pacific Co.*, 328 U. S. 217 recognized, without any consideration of evidence of distinct treatment in the community, that daily wage earners constitute a distinct class. (328 U. S. at 224-225.) There is certainly no basis for arguing that the daily wage earners who constitute a "distinct class" in a Federal Court would be any less so in a State Court.

13. In deciding *Thiel* on the basis of its supervisory power, this Court adhered to its salutory practice of avoiding constitutional issues where other grounds of decision are clearly available. See *Ashwander v. TVA*, 297 U. S. 288, 341 (Brandeis, J., concurring).

The Court's language in *Thiel* shows quite clearly that this Court was conscious of the constitutional overtones of that decision. It is hardly novel that requirements initially imposed upon the federal courts by this Court in the exercise of its supervisory power, or through the interpretation of federal statutes or of specific constitutional provisions, are found equally applicable to the state courts as the result of the Fourteenth Amendment. See, *e.g., Gideon v. Wainwright*, 372 U. S. 335; *Mapp v. Ohio*, 367 U. S. 643; and see generally Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666-1667 (1963).

It is true that this Court, in *Fay v. New York*, 332 U. S. 261, said that, when other than racial groups are involved, it must be found that their exclusion was "... such as to deny a fair trial . . ." (332 U. S. at 293).[14] This dictum, however, is in a case in which this Court carefully considered the evidence relating to exclusionary practices and held that it failed to establish that the New York statute, either on its face or as applied, resulted in the systematic exclusion of either women or wage earners (332 U. S. at 270-278, 291). Furthermore, *Fay* was decided at a time when the rights of an accused in a state criminal trial as to jury exclusion, where racial exclusion was not alleged, were relatively unclear and constituted a novel question. The subsequent decisions of this Court in *Hernandez* and *Hoyt* have erased this doubt and make it clear that the arbitrary

14. The decisions of the Second and Third Circuits cited by the petitioner do not support his position. *Vanderwyde v. Denno*, 210 F. 2d 105 (2nd Cir. 1954), *affirming per curiam*, 113 F. Supp. 918 (S. D. N. Y. 1953), *cert. den.*, 347 U. S. 949, involved an attack on the New York "special" jury system involved in *Fay*, and, like that decision, concluded that no exclusionary practice was shown. The facts in *United States ex rel. Sturdivant v. New Jersey*, 289 F. 2d 46 (3rd Cir. 1961), *cert. den.*, 386 U. S. 864, bear no resemblance to those in the present record, and the court there expressly recognized the right of an accused to a method of jury selection adapted ". . . to the selection of an impartial group of persons, *reasonably representative of the community in cross section*. . . ." 289 F. 2d at 848 (Emphasis supplied).

exclusion of any significant class constitutes a violation of the Fourteenth Amendment.

Any reliance upon *Fay* to say that specific prejudice must be shown has to be evaluated in the light of a long course of decisions by this Court dealing with the enforcement of constitutional rights in state and federal criminal trials. Just last month, this Court held that the beneficiary of an error of constitutional dimensions must "... prove *beyond a reasonable doubt* that the error complained of did not contribute to the verdict obtained." *Chapman, et al. v. California,* 35 U.S. L. WEEK 4197, 4199 (U. S. Feb. 20, 1967) (Emphasis supplied). See also, *Fahy v. Connecticut,* 375 U. S. 85, 86, holding that even the "reasonable possibility" of prejudice through constitutional error requires reversal. These decisions establish that the petitioner has the burden of showing *lack of prejudice* due to constitutional error, and the burden is a heavy one. Moreover, as Mr. Justice Stewart pointed out in his concurring opinion in *Chapman,* after carefully surveying this Court's relevant decisions, in many instances it has been held that constitutional violations can *never* be treated as non-prejudicial, 35 U. S. L. WEEK at 4205. *Chapman* is merely a reiteration of a long line of decisions where reversal was required because of the *possibility of prejudice* on the part of the trier-of-fact. *Sheppard v. Maxwell,* 384 U. S. 333 (prejudicial publicity); *Bollenbach v. United States,* 326 U. S. 607 (instruction on an unconstitutional presumption); *Tumey v. Ohio,* 273 U. S. 510 (financial interest of the judge).

CONCLUSION.

For the reasons stated in the Brief in Opposition to the Petition for a Writ of Certiorari, said Petition should be denied.

Respectfully submitted,

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